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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
QUALCOMM Incorporated	)	GEN Docket No. 90-314
Application for a Pioneer's Preference	)	File No. PP-68

REPLY COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation on behalf of its telephone and wireless companies ("GTE") hereby submits its reply to comments filed by QUALCOMM Incorporated ("QUALCOMM") in the above-captioned proceeding. In its comments, QUALCOMM argued that, in light of the United States Court of Appeals for the District of Columbia Circuit's decision in *Freeman Engineering Associates, Inc. v. FCC*,[1] the Federal Communications Commission ("FCC" or "Commission") must grant QUALCOMM's application for a pioneer's preference. QUALCOMM's comments, however, did not address the issue of what, if any, spectrum license the FCC should issue to QUALCOMM if the pioneer's preference is granted.[2]

GTE takes no position on the merits of QUALCOMM'S application for a pioneer's preference. However, if the Commission decides to grant QUALCOMM's application, the Commission should not issue QUALCOMM any broadband personal

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1 *Freeman Engineering Associates, Inc. v. Federal Communications Commission,* Case No. 94-1779 (D.C. Cir., January 7, 1997) (hereinafter "*Freeman Engineering*").

2 QUALCOMM Incorporated Application for a Pioneer's Preference, GEN Docket No. 90-314, File No. PP-68, Comments (filed February 24, 1997, by QUALCOMM Incorporated).

communications service ("PCS") or other license FCC authorized radio service license currently held by another licensee.

I. Background

QUALCOMM filed its application for a pioneer's preference in the broadband PCS services in 1992. In November of 1992, the FCC released a tentative decision rejecting QUALCOMM's application on grounds that its proposed CDMA technology was developed for use in the 800 MHz cellular bands rather than 2 GHz PCS and that QUALCOMM had not developed and tested 2 GHz equipment.[3] In 1994, the Commission denied QUALCOMM's application, but dropped its assertion that QUALCOMM had not tested its technology at 2 GHz.[4] The Commission later denied QUALCOMM's petition for reconsideration of the *Third Report and Order*.[5] QUALCOMM and other unsuccessful applicants petitioned for review of these decisions in the United States Court of Appeals for the District of Columbia Circuit.

On January 7, 1997, the Court issued its decision in *Freeman Engineering*. With respect to the Commission's denial of QUALCOMM's application, the Court gave deference to the Commission's interpretation of its own rules and found that the denial of QUALCOMM's application based on the fact CDMA technology was an adaptation of

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[3] Amendment of the Commission's Rules to Establish New Personal Communications Services, *Tentative Decision and Memorandum Opinion and Order*, GEN Docket No. 90-314, 7 FCC Rcd 7794, 7807 (1992).

[4] Amendment of the Commission's Rules to Establish New Personal Communications Services, *Third Report and Order*, GEN Docket No. 90-314, 9 FCC Rcd 1337, 1368-1370 (1994).

[5] Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, GEN Docket No. 90-34, 9 FCC Rcd 7805 (1994).

a technology developed for another service was reasonable.[6] The Court found, however, that the Commission erred by inconsistently applying its standards. In particular, the Court found that the Commission had granted another pioneer's preference to an entity that had adapted technology developed initially for another service.[7] The Court remanded the case back to the Commission "for further proceedings to remedy this inconsistency."[8]

On February 18, 1997, the FCC's Office of Engineering and Technology ("OET") issued a Public Notice seeking comment on the issues raised on remand.[9] In particular, OET asked parties to recommend what action it should recommend to the Commission. On February 24, 1997, QUALCOMM filed comments stating only that the Commission should grant QUALCOMM's pioneer's preference application.[10] By letter dated March 5, 1997, summarizing a previous meeting with Commission staff, however, QUALCOMM made clear that it was asking the Commission to grant to QUALCOMM the A block PCS license for the Miami MTA. That license is currently held by Sprint Spectrum. In the alternative, QUALCOMM stated that it would be willing to consider a

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6 *Freeman Engineering* at 11.

7 *Id.* at 13-14.

8 *Id.* at 14.

9 Filing Period Announced for Comments on QUALCOMM's Pioneer's Preference Application (GEN Docket No. 90-314), Public Notice, DA 97-351 (February 18, 1997).

10 Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Comments (filed February 24, 1997 by QUALCOMM Incorporated).

substitution of the Phoenix and other BTAs in order to enable the Commission to avoid embarrassment.[11]

II. Discussion

GTE takes no position regarding whether the Commission should grant QUALCOMM a pioneer's preference in response to the Court's remand.[12] Should the Commission grant QUALCOMM a pioneer's preference, however, GTE is opposed to granting QUALCOMM any broadband PCS or other FCC authorized radio service license currently held by another licensee.

In asking to be granted the A block license in the Miami MTA, QUALCOMM argues that FCC and court precedent holds that licensees take their licenses subject to pending litigation.[13] QUALCOMM's argument, however, tells only half of the story. Nothing in the FCC or court cases cited by QUALCOMM requires the FCC to take back an existing license in the event that a challenging party prevails in subsequent FCC or court action. Indeed, in the context of a challenge to broadband PCS licenses, the Commission stated, "[p]etitioners themselves acknowledge that 'license grants which

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[11] Letter, from Veronica M. Ahern, counsel for QUALCOMM Incorporated to William F. Caton, Secretary, Federal Communications Commission, dated March 5, 1997 ("March 5 letter").

[12] GTE initially objected to QUALCOMM's application on grounds that it had not made an adequate technical demonstration. Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, GTE's Comments in Opposition (filed June 10, 1992) at 9. Whether or not QUALCOMM had adequately tested its equipment in 1992, however, is no longer an issue in this proceeding.

[13] March 5 letter at 2-3.

are challenged by litigation are subject to that litigation and *may* be undone if the basis of the grant is reversed as a result of the outcome of the litigation.'"[14]

By law the FCC must base all licensing decisions on whether grant of a license will serve the public interest convenience and necessity.[15] Thus, any decision to grant QUALCOMM any license must be based on whether doing so is in the public interest. GTE believes that granting QUALCOMM any license currently held by another entity would be contrary to the public interest.

First, QUALCOMM has not shown that Sprint Spectrum, or any other entity currently holding an FCC radio license that QUALCOMM might seek, is operating contrary to the public interest. Accordingly, the Commission must presume that Sprint is operating or will operate in a way that advances the public interest. Assuming that QUALCOMM, if substituted for Sprint Spectrum, would also serve the public interest, the public would be no better off after the change. If the Commission were to grant QUALCOMM a license or licenses not currently held by another party, however, the public interest would be advanced. In this situation, Sprint Spectrum's customers (or prospective customers) would continue to receive adequate service, while customers in

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[14] Application of Wireless Co., L.P. for a License to Provide Broadband PCS Service on Block A in the San Francisco Major Trading Area (M004), *Order*, 10 FCC Rcd 13233, 13236 (1995) (emphasis added). Similarly, the court case cited by QUALCOMM makes clear that take back of the issued license is an option not a requirement. *Alianza Federal De Mercedes v. F.C.C.*, 539 F.2d 732, 736 (D.C. Cir. 1975)(stating "*If* giving effect to a judgment of this court culminates in a Commission order vacating its grant of KOB-TV's 1971-1974 license renewal . . .") (emphasis added).

[15] 47 U.S.C. § 309(a).

another market or markets not currently being served would benefit from the services QUALCOMM would offer.

Second, substituting QUALCOMM for any current FCC radio licensee would likely result in a delay of service to that market. Broadband PCS licensees, by this time, have invested millions of dollars – above and beyond what was paid for the license itself – to acquire cell sites, construct networks, hire or transfer employees, and market services to the public. In addition, carriers acquired PCS properties as part of overall corporate marketing strategies affecting not only wireless, but other communications services they provide. No carrier, having made that investment and developed a business strategy including a particular market, will be willing to give up its license without a fight. Any resulting prolonged legal battle cannot help but diminish the level of service provided to the public.[16] As such, the public interest would not be served by taking back the existing license.

Finally, the Commission should not consider taking back any issued license because such action would be unfair to both the current licensee and its customers. Licensees cannot let the pendency of court cases affect how they do business. Licensees must enter into business relationships, hire and/or transfer employees, and attempt to build a loyal customer base in order to succeed in the marketplace. Absent a showing that the licensee has failed to serve the public interest, it would be

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[16] For example, an incumbent licensee faced with the prospect of losing the license in a legal battle might be less willing to make investment in infrastructure, particularly if the infrastructure is unlikely to produce an immediate return.

fundamentally unfair to the licensee, persons doing business with the licensee, and persons hired or transferred by the licensee, to have that license revoked.

In addition, taking back an existing FCC radio license would be unfair to customers of the licensee. QUALCOMM has stated that it would employ the same technology (CDMA) as Sprint Spectrum in the Miami MTA. The type of service provided to the public, however, depends not only on the technology used, but on factors such as the level of investment the licensee is able to make, the configuration of the network, the people hired, and the marketing strategy. Given that these factors differ from company to company, substituting QUALCOMM for Sprint Spectrum (or any other current FCC licensee) will affect the type of service provided to the public and therefore will affect the public interest. Absent a showing that Sprint Spectrum or any other current FCC radio licensee is not serving the public interest, it would be unfair to force an incumbent licensee's customers or prospective customers to get service from a different entity.

III. Conclusion

GTE takes no position regarding whether the Commission should grant QUALCOMM a pioneer's preference in fulfillment of the Court's mandate in *Freeman Engineering Associates, Inc. v. FCC*. Should the Commission grant the preference, however, GTE believes the public interest would best be served by granting QUALCOMM an FCC radio license or licenses not currently held in good standing by another licensee.

Respectfully submitted,

GTE Service Corporation and its telephone and wireless companies

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March 20, 1997

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Certificate of Service

I, Judy R. Quinlan, hereby certify that copies of the foregoing "Reply Comments of GTE Service Corporation" have been mailed by first class United States mail, postage prepaid, on March 20, 1997, to the parties listed below:

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